

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WINDSOR WEST VENTURES, LLC,)	3:14-cv-00539-HDM-VPC
)	
Plaintiff,)	
)	ORDER
vs.)	
)	
NEVADA URBAN INDIANS, INC.,)	
)	
Defendant.)	
)	

Before the court is the plaintiff Windsor West Ventures, LLC's ("plaintiff") motion for summary judgment and two supplements thereto. (#17, #23 & #36). Defendant Nevada Urban Indians, Inc. ("defendant") has opposed (#20), and plaintiff has replied (#22).

On June 27, 2013, defendant as tenant and plaintiff as landlord entered into a commercial lease agreement. The lease term was to commence September 1, 2013, or as soon as improvements requested by the defendant were completed, and run through August 31, 2020. Defendant began occupying the leased premises in January 2014. Shortly thereafter, plaintiff asserts, defendant began complaining about the condition of the property and expressed an intent to vacate. In response, plaintiff filed this suit for

1 anticipatory breach of contract and declaratory relief. Defendant
2 answered and counterclaimed for breach of the lease. Plaintiff now
3 moves for entry of summary judgment on its claims, both on
4 liability and damages, as well as defendant's counterclaims.¹

5 Summary judgment shall be granted "if the movant shows that
6 there is no genuine issue as to any material fact and the movant is
7 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).
8 The burden of demonstrating the absence of a genuine issue of
9 material fact lies with the moving party, and for this purpose, the
10 material lodged by the moving party must be viewed in the light
11 most favorable to the nonmoving party. *Adickes v. S.H. Kress &*
12 *Co.*, 398 U.S. 144, 157 (1970); *Martinez v. City of Los Angeles*, 141
13 F.3d 1373, 1378 (9th Cir. 1998). A material issue of fact is one
14 that affects the outcome of the litigation and requires a trial to
15 resolve the differing versions of the truth. *Lynn v. Sheet Metal*
16 *Workers Int'l Ass'n*, 804 F.2d 1472, 1483 (9th Cir. 1986); *S.E.C. v.*
17 *Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

18 Once the moving party presents evidence that would call for
19 judgment as a matter of law at trial if left uncontroverted, the
20 respondent must show by specific facts the existence of a genuine
21 issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
22 250 (1986). "[T]here is no issue for trial unless there is
23 sufficient evidence favoring the nonmoving party for a jury to
24 return a verdict for that party. If the evidence is merely
25

26 ¹ Subsequent to the plaintiff's filing of its motion, defendant gave
27 notice that it intended to vacate by September 30, 2015. Plaintiff asserts
28 that the defendant stopped paying rent on September 30, 2015. At a hearing
on that date before this court, defendant represented that it had paid rent
through October. Plaintiff did not contest defendant's representation.

1 colorable, or is not significantly probative, summary judgment may
2 be granted." *Id.* at 249-50 (citations omitted). "A mere scintilla
3 of evidence will not do, for a jury is permitted to draw only those
4 inferences of which the evidence is reasonably susceptible; it may
5 not resort to speculation." *British Airways Bd. v. Boeing Co.*, 585
6 F.2d 946, 952 (9th Cir. 1978).

7 Plaintiff seeks judgment on its breach of contract claim.
8 However, as defendant has vacated the property, Nevada Revised
9 Statutes § 118.175 requires plaintiff to take reasonable steps to
10 mitigate its damages. Whether plaintiff has taken sufficient steps
11 to satisfy this obligation is a question of fact that must be
12 resolved at trial.

13 Further, plaintiff seeks judgment on its claim for declaratory
14 relief, which seeks a declaration that defendant has not been
15 constructively evicted. To prove constructive eviction, the
16 defendant must prove that: (1) plaintiff either acted or failed to
17 act; (2) plaintiff's action or inaction rendered "the whole or a
18 substantial part of the premises ... unfit for occupancy for the
19 purpose for which it was leased"; (3) defendant vacated the
20 premises within a reasonable time; and (4) defendant provided
21 plaintiff notice of and a reasonable opportunity to cure the
22 defect. *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev., LLC*,
23 335 P.3d 211, 214-15 (Nev. 2014). Although the evidence is quite
24 thin, there is evidence of circumstances that, taken together,
25 could have rendered the premises unfit for the purpose for which it
26 was leased, including but not limited to: failure to complete one
27 of the exam rooms as agreed, multiple nonfunctioning electrical
28 outlets, holes in the wall, damage to items in the office

1 overnight, as well as doors left unlocked after hours, and a public
2 bathroom - which defendant's clients used - kept in an unsanitary
3 or unusable condition. (See Pl. Mot. Ex. 2 (Reeves Dep. at 22-23,
4 28-30, 35, 40, 48-49, 52, 53-57 ,66 & 69)). Whether defendant
5 vacated the premises in a reasonable period of time and gave
6 plaintiff sufficient notice as required by the law are also
7 questions of fact for the trier of fact. Accordingly, genuine
8 issues of material fact preclude summary judgment on the
9 constructive eviction claim.

10 For similar reasons, triable issues of fact exist as to the
11 defendant's counterclaim for breach of the lease agreement. Most
12 particularly, the lease required plaintiff to "install sinks with
13 lower cabinets in two (2) exam rooms. . . ." (Mot. Summ. J. Ex.
14 1)). Reeves testified that one of the exam rooms had not been
15 completed and specifically did not contain a sink in accordance
16 with the lease agreement. *Id.* Ex. 2 (Reeves Dep. at 22-23, 28-30,
17 35 & 69)). There is therefore a genuine issue of material fact on
18 the defendant's counterclaim, as well.

19 Because of the nature of the alleged breaches, the court is
20 not persuaded by plaintiff's argument that an expert witness is
21 required to a prove that it breached its duties or the lease.

22 Accordingly, the plaintiff's motion for summary judgment (#17,
23 #23, #36) is hereby **DENIED**.

24 **IT IS SO ORDERED.**

25 DATED: This 4th day of February, 2016.

26 

27 UNITED STATES DISTRICT JUDGE
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